

AO 120 (Rev. 3/04)

<b>TO:</b> <b>Mail Stop 8</b> <b>Director of the U.S. Patent and Trademark Office</b> <b>P.O. Box 1450</b> <b>Alexandria, VA 22313-1450</b>	<b>REPORT ON THE</b> <b>FILING OR DETERMINATION OF AN</b> <b>ACTION REGARDING A PATENT OR</b> <b>TRADEMARK</b>
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been  
 filed in the U.S. District Court NCWD on the following ☐ Patents or ☒ Trademarks:

DOCKET NO. 3:08cv347	DATE FILED 7/28/2008	U.S. DISTRICT COURT NCWD
PLAINTIFF BSN Medical, Inc.		DEFENDANT Group hug Productions Inc. et al
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 7,243,003		***See attached complaint***
2 7,217,300		
3 7,209,180		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1		
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK <b>FRANK G. JOHNS</b>	(BY) DEPUTY CLERK <i>Rupinder Singh</i>	DATE 7/28/08
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Copy 1—Upon initiation of action, mail this copy to Director    Copy 3—Upon termination of action, mail this copy to Director  
 Copy 2—Upon filing document adding patent(s), mail this copy to Director    Copy 4—Case file copy

60. Defendants are aware or should reasonably be aware that it does not have sponsorship, approval, or affiliation with BSN's Jobst® products, and that the other products offered for sale by Defendants are not of the particular standard, quality, or grade used in BSN's Jobst® products.

61. Defendants' conduct has created a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval of its goods with those distributed under the Jobst® Marks.

62. As a direct and proximate result of the likely confusion, mistake, or deception, BSN has suffered and will continue to suffer irreparable harm if the conduct of Defendants is not enjoined.

**Seventh Claim for Relief**  
**(Breach of Contract)**

63. All paragraphs above are incorporated by reference as if fully restated herein.

64. As part of the parties' distribution agreement, BSN and Defendant entered into a binding contract, styled the Terms of Use Agreement (the "Agreement"), under which Defendant was granted the right to use certain intellectual property belonging to BSN in exchange for agreeing to some limitations on the use of that intellectual property.

65. The Agreement states that "[a]ll intellectual property rights that [Healthy Legs is] authorized to use are forfeited immediately upon termination of [Healthy Legs'] status as a Jobst® Dealer or Distributor."

66. BSN terminated Defendant's distributorship by notifying Defendant of the termination on August 8, 2007.

67. Defendant breached the Agreement by continuing to use the Jobst® Marks after the termination of Defendant's distributorship.

68. BSN has suffered damage, including but not limited to loss of profits and damage to its business reputation, as a direct and proximate result of Defendant's breach of the Agreement.

**Jury Demand**

BSN respectfully requests a jury trial in this matter.

**WHEREFORE**, the Plaintiff, BSN, prays that the Court:

A. Preliminarily and permanently enjoin and restrain the Defendants:

1. from committing any acts of unfair competition and from implying a false designation of origin or a false description or representation with respect to BSN's Jobst® Marks;
2. from committing any acts of unfair competition by passing off or inducing or enabling others to sell or pass off goods/services that are not BSN's goods as those of BSN;
3. from making any statements on promotional materials or advertising for Defendants' goods that are false or misleading as to source or origin;
4. from using any designation that is likely to disparage, tarnish or dilute the distinctive quality of BSN's Jobst® Marks; and
5. from committing any acts of deceptive or unlawful trade practices calculated to cause members of the trade or purchasing public to believe that Defendants' goods are the goods of BSN or are sponsored by or associated with, or related to, or connected with, or in some way endorsed or promoted by BSN under the supervision or control of BSN.

B. Order that Defendants remove from their respective websites any and all uses of the Jobst® Marks and statements implying sponsorship, association, or control by BSN.

C. Order that Defendants, within thirty (30) days after service of notice of entry of judgment or issuance of an injunction pursuant thereto, file with the Court and serve upon BSN's counsel a written report under oath setting forth details of the manner in which Defendant's have complied with the Court's order pursuant to paragraphs A and B above.

D. Order Defendants to account and pay over to BSN all damages sustained by BSN, Defendants' profits, BSN's attorneys' fees and costs, and ordering that the amount of damages awarded BSN be increased three times the amount thereof.

E. Award BSN such other relief as the Court may deem just and proper.

Respectfully submitted, this the 28<sup>th</sup> day of July, 2008.

/s/ William C. Mayberry

William C. Mayberry

N.C. State Bar No. 20572

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

Civil Action No.: \_\_\_\_\_

BSN MEDICAL, INC., a Delaware  
Corporation,

Plaintiff,

v.

ART WITKOWSKI, GROUPHUG  
PRODUCTIONS, INC. d/b/a HEALTHY  
LEGS and HEALTHY LEGS AND FEET  
TWO!,

Defendants.

**COMPLAINT**

Plaintiff, BSN Medical, Inc. ("BSN") by and through its attorneys, complains against  
Defendants Art Witkowski and Grouphug Productions, Inc. as follows:

**Parties**

1. Plaintiff BSN Medical, Inc. ("BSN") is a Delaware Corporation having its principal place of business at 5825 Carnegie Blvd., Charlotte, North Carolina 28209.
2. Defendant Grouphug Productions, Inc. ("Grouphug ") is an Oregon Corporation having its registered office at 16223 NW McNamee Road, Portland, Oregon, 97231 and its principal place of business at the same location.
3. Healthy Legs and Feet Too! and Healthy Legs are assumed names for Grouphug.
4. Defendant Art Witkowski is an individual who resides in Oregon and operates Grouphug.

### **Jurisdiction and Venue**

5. This is an action for trademark infringement, unfair competition, and dilution under the Lanham Act, 15 U.S.C. §§ 1051 et seq., copyright infringement under the Copyright Act, 17 U.S.C. § 501, and deceptive trade practices arising under the North Carolina Unfair Business Practices Act, N.C. § 75-1.1, and the Oregon Unlawful Trade Practices Act, Or. Rev. Stat. § 646.608. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1332 and 1338, 15 U.S.C. § 1121, and has supplemental jurisdiction under 28 U.S.C. § 1367.

6. Venue is proper in this District under 28 U.S.C. § 1391(b). A substantial part of the events giving rise to these claims occurred in this district.

### **Facts**

7. Plaintiff BSN is an industry leader in the medical hosiery, garment, and bandage industry. BSN sells its medical hosiery documents under the trademark and service mark "Jobst®".

8. BSN has the right to use and control the Jobst® wordmark, logo and other trademarks (the "Jobst® Marks") through its subsidiary relationship to the owner of the Jobst® Marks, BSN Medical GmbH.

9. BSN has manufactured and sold Jobst® products under the Jobst® Marks for many years. The Jobst® Marks are registered with the United States Patent and Trademark Office under U.S. Reg. Nos. 72430035, 72173006, 72091803.

10. Because of the extensive use of the Jobst® mark in connection with high quality medical leg care products, the Jobst® mark has acquired considerable value and has become well known among the consuming public and the trade as identifying and distinguishing the exclusive

source of the Jobst® products. In fact, Jobst® medical hosiery is the brand most frequently recommended by doctors and is the market share leader.

11. BSN sells Jobst® products to distributors through distribution agreements for direct sale to consumers.

12. Defendants operate for-profit web sites offering for sale a variety of leg health products. Defendant Art Witowski operates Grouphug and the Healthy Legs entities.

13. BSN previously entered into a distribution agreement with Defendants.

14. BSN terminated that distribution agreement on August 8, 2007. At termination, Defendants forfeited all rights to use the intellectual property of BSN, including the Jobst® mark.

15. Defendants' website, [www.healthylegs.com](http://www.healthylegs.com), represents to site visitors that it is affiliated with Jobst® products. Specifically, the website represents that "Jobst is committed to total satisfaction for its recommenders and wearers. That is why each product comes with *our* unique Total Satisfaction Guarantee." (Emphasis added).

16. Also, until recently the website stated that "[f]or over 50 years, Jobst® is dedicated to meeting your needs. We offer the highest quality products that range from medical hosiery to bandages. We research our products to make sure they meet our promise of the highest efficacy."

17. The web site representations boldly imply that Jobst® and the web site are operated by a single entity.

18. The statements have been copied verbatim from the copyrighted pages of the Jobst® product website.

19. Defendants intend by their use of the Jobst® Marks in connection with their internet sales to trade off the resounding consumer goodwill of the Jobst® Marks and product.

20. There is no association or affiliation of any kind between BSN and the Defendants. The Defendants' use of the Jobst® Marks to market products other than the genuine Jobst® products is without BSN's permission or consent.

21. In fact, BSN demanded and Defendants agreed to quit using the Jobst® Marks last fall. However, after agreeing to discontinue use, Defendants refused to execute a settlement agreement, as they previously had agreed.

22. BSN did not sue at that time because Defendants discontinued their infringing activities.

23. However, in the late spring of this year, BSN noticed that Defendants had renewed their infringement, in particular on their webpages.

24. On May 21, 2008, BSN sent Defendants a letter demanding that Defendants cease and desist infringing the Jobst® Marks on their webpages.

25. To date, Defendants have failed or refused to respond to the May 21, 2008 cease and desist letter.

**First Claim For Relief**  
**(Federal Unfair Competition)**

26. All paragraphs above are incorporated by reference as if fully restated herein.

27. BSN's Jobst® Marks are distinctive.

28. Defendants' use of the Jobst® Marks is likely to cause confusion, mistake, or deception as to the source of origin of the products provided by Defendants in connection with the Jobst® Marks in that customers and potential customers are likely to believe that such

products are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to BSN.

29. Defendants' use of the Jobst® Marks is likely to cause confusion, mistake, or deception, in that customers and potential customers are likely to believe there is sponsorship, approval, licensing, affiliation, association, or some legitimate connection between the products provided by Defendants' in connection with the Jobst® mark and BSN's Jobst® products.

30. As a direct and proximate result of the likely confusion, mistake, or deception, BSN has suffered and will continue to suffer irreparable harm if the conduct of Defendants is not enjoined.

31. The likely confusion, mistake, or deception caused by Defendants is in violation of 15 U.S.C. § 1125(a).

32. Pursuant to 15 U.S.C. § 1117, BSN is entitled to recover the costs of this action. The intentional nature of Defendants' unlawful acts renders this an "exceptional case," entitling BSN to an award of attorneys' fees under 15 U.S.C. § 1117(a).

**Second Claim For Relief**  
**(Federal Trademark Dilution)**

33. All paragraphs above are incorporated by reference as if fully restated herein.

34. The Jobst® Marks are famous trademarks within the meaning of 15 U.S.C. § 1125(c), and became famous before Defendants began using the Jobst® Marks to market non-Jobst® goods. The Jobst® Marks are advertised and used extensively throughout the United States, and is highly recognizable by the trade and consuming public. Further, the owner of the Jobst® Marks and its licensees, including BSN, actively police the use of the Jobst® Marks by third parties.

35. Defendants are engaged in a commercial use of the Jobst® Marks.

36. Defendants' activities are disparaging and damaging, and lessen the distinctiveness of the Jobst® Marks through, at the very least, blurring and tarnishing the Jobst® Marks. Defendants' advertising of the Jobst® Marks disparages BSN's products by, at least, creating an unfair comparison between BSN's genuine Jobst® goods and Defendants' other goods for sale.

37. Upon information and belief, Defendants' actions described herein were intentional or with a reckless disregard for or with willful blindness to the BSN's rights for the purpose of trading on BSN's reputation and diluting the Jobst® Marks.

38. As a result of the above-described diluting and disparaging activities of Defendants, BSN has suffered, and will continue to suffer, irreparable injury and substantial damages, while Defendants have been and will continue to be unjustly enriched.

**Third Claim For Relief**  
**(Federal Trademark Infringement)**

39. All paragraphs above are incorporated by reference as if fully restated herein.

40. Defendants have used in commerce BSN's Jobst® Marks without the consent of the BSN.

41. Defendants' use of the Jobst® Marks in offering goods for sale related to those manufactured and distributed by BSN is likely to cause confusion, mistake or deception and thus infringes the BSN's rights in those marks under 15 U.S.C. § 1114.

42. By continuing to use the Jobst® Marks, despite having actual knowledge of the BSN's rights, Defendant is deliberately trading upon the valuable goodwill established by BSN in the Jobst® Marks.

43. With actual knowledge of BSN's exclusive right to use the BSN Jobst® Marks and deliberately intending to benefit unfairly from BSN's goodwill in the Jobst® Marks, Defendant has acted in willful disregard of BSN's rights.

44. BSN has suffered injury as a result of Defendants' acts of infringement.

**Fourth Claim For Relief**  
**(Federal Copyright Infringement)**

45. All paragraphs above are incorporated by reference as if fully restated herein.

46. Defendants have engaged in copyright infringement in violation of 17 U.S.C. § 501.

47. BSN owns valid a valid copyright for the content of its website, www.jobst-usa.com.

48. Defendants have actually copied the content under the copyright ownership of BSN for use on their own website, www.healthylegs.com.

49. Defendants have misappropriated the copyrighted content of BSN's website by copying its provisions in totality, without permission or license from BSN.

50. BSN has suffered harm as a result of Defendants' copyright infringement.

**Fifth Claim For Relief**  
**(North Carolina Unfair Trade Practices Act)**

51. All paragraphs above are incorporated by reference as if fully restated herein.

52. Defendants have engaged in unfair and deceptive acts in violation of N.C. Gen. Stat. § 75-1.1 because Defendant's use of the Jobst® Marks in connection with the sale of other goods in consumer transactions misrepresents that the goods sold by Defendants have certain qualities, characteristics, ingredients, uses or benefits. Defendants' use of the Jobst® Marks in

connection with non-approved goods also misrepresents the source, sponsorship, approval, or certification of the goods sold by Defendants in connection with the Jobst® Marks.

53. Defendants are aware or should reasonably be aware that it does not have sponsorship, approval, or affiliation with BSN's Jobst® products, and that the other products offered for sale by Defendants are not of the particular standard, quality, or grade used in BSN's Jobst® products.

54. Defendants' conduct was in commerce and has affected commerce.

55. As a direct and proximate result of the likely confusion, mistake, or deception, BSN has suffered and will continue to suffer irreparable harm if the conduct of Defendants is not enjoined.

56. Pursuant to N.C. Gen. Stat. § 75-16.1, BSN is entitled to recover its costs and attorneys' fees because of Defendants' willful conduct.

57. Pursuant to N.C. Gen. Stat. § 75-16, BSN is entitled to recover treble damages from Defendants because it has been injured in its business by Defendants' unlawful conduct.

**Sixth Claim For Relief**  
**(Oregon Unlawful Trade Practices Act)**

58. All paragraphs above are incorporated by reference as if fully restated herein.

59. Defendants have engaged in unfair acts in violation of Or. Rev. Stat. § 646.608(b) because Defendant's use of the Jobst® Marks in connection with the sale of other goods in consumer transactions misrepresents that the goods sold by Defendants have certain qualities, characteristics, ingredients, uses or benefits. Defendants' use of the Jobst® Marks in connection with non-approved goods also misrepresents the source, sponsorship, approval, or certification of the goods sold by Defendants in connection with the Jobst® Marks.